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No. 021642

IN THE

Supreme Court of the United States

THOMAS JEFFERSON UNIVERSITY HOSPITAL AND
PHILIP HIRSHMAN, M.D.,

Petitioners,

and

HEE-OK PARK CHAI, M.D.,

Respondent,

v.

DIANE BYNUM AND FOUNTAIN PARRISH,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the decisions of the Pennsylvania appellate courts violate defendants' constitutional rights to due process and fundamental fairness by determining that evidence of abortion, in and of itself, is demonstrably prejudicial and therefore inadmissible despite the fact that plaintiffs placed the evidence directly in issue and despite the fact that defendants will effectively be precluded from defending serious allegations of fraud and conspiracy without the evidence?

2. Did the decisions of the Pennsylvania appellate courts violate defendants' constitutional rights to due process and fundamental fairness by ruling that it is permissible to let a jury infer conspiracy without plaintiffs having pled or proven the same and without giving defendants the opportunity to fully and completely respond to the allegations of conspiracy?

3. Did plaintiffs waive their right to challenge the trial court's admission of the abortion evidence since they brought Ms. Bynum's medical records, which included reference to her prior abortion, into question by alleging that defendants fraudulently altered the medical records, and then failed to request a mistrial or a cautionary instruction as to this evidence?

LIST OF PARTIES TO THE PROCEEDING

Petitioners are Thomas Jefferson University Hospital ("TJUH") and Philip Hirshman, M.D. Hereinafter, Dr. Hirshman and TJUH may be referred to collectively as "defendants."

Respondents are Diane Bynum ("plaintiff" or "Ms. Bynum") and Fountain Parrish. Hereinafter, Ms. Bynum and Mr. Parrish may be referred to collectively as "plaintiffs."

Respondent, Hee-Ok Park, M.D, a defendant in the trial court proceedings, is not involved in this appeal.

Corporate Disclosure Statement

TJUH is a non-profit corporation and is a subsidiary of TJUH System. There are no publicly held companies that own 10% or more of TJUH's stock.

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CITATION OF OPINIONS AND ORDERS BELOW

1. Order of the Supreme Court of Pennsylvania, dated February 6, 2003, denying defendants' Application for Reconsideration of the Pennsylvania Supreme Court's Order, dated December 10, 2002, denying the Petition for Allowance of Appeal. App. 1a. The Court's February 6, 2003 Order has not been officially published or reported.

2. Order of the Supreme Court of Pennsylvania, dated December 10, 2002, denying defendants' Petition for Allowance of Appeal. *Bynum v. Thomas Jefferson Univ. Hosp.*, 816 A.2d 1101 (Pa. 2002)(decision without published opinion); *see also* App. 2a.

3. Order of the Superior Court of Pennsylvania, dated July 31, 2002, denying defendants' Application for Reconsideration and/or for Reargument *en banc* of the May 29, 2002 decision of the Superior Court. App. 3a. The Superior Court's July 31, 2002 Order has not been officially published or reported.

4. Judgment and Memorandum of the Superior Court of Pennsylvania, dated May 29, 2002, reversing the Judgment entered in favor of defendants in the Philadelphia County Court of Common Pleas and remanding the matter for a new trial. App. 4a-19a. The Superior Court's Judgment and Memorandum have not been officially published or reported.

5. Order of the Philadelphia County Court of Common Pleas, dated November 21, 2000, denying plaintiffs' Motion for Post-Trial Relief, and the May 16, 2001 Opinion of the Court of Common Pleas in support of its November 21, 2000 Order. App. 20a-35a. The trial court's Order and Opinion have not been officially published or reported.

STATEMENT OF JURISDICTION

Dr. Hirshman and TJUH respectfully request that this Court review the May 29, 2002 Judgment of the Pennsylvania Superior Court, as well as the December 10, 2002 Order of the Pennsylvania Supreme Court which denied their Petition for Allowance of Appeal (emanating from the Superior Court's May 29, 2002 Judgment). A timely Application for Reconsideration of the Supreme Court's December 10, 2002 Order was filed in accordance with Pennsylvania Rule of Appellate Procedure 1123. In accordance with U.S. Supreme Court Rule 13.1, this Petition is being timely filed within 90 days of the entry of the February 6, 2002 Order of the Pennsylvania Supreme Court which denied defendants' Application for Reconsideration. *See* S.C.R. 13.1. This Court has jurisdiction to review the Orders in question pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. 14, §1.

The Pennsylvania Constitution, Article 1, Section 11 provides:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Pa. Const., Art. 1, §11.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Plaintiffs commenced this medical malpractice action against TJUH and Dr. Hirshman by the filing of a Complaint in the Court of Common Pleas of Philadelphia County, Pennsylvania. App. 21a-22a. Plaintiffs assert that Dr. Hirshman was negligent in failing to order appropriate follow-up testing after Ms. Bynum allegedly informed him that she was experiencing decreased fetal movement. Plaintiffs contend that Dr. Hirshman's alleged negligence caused the death of their unborn child and that they suffered resultant emotional distress. The only claim presented was for plaintiffs' emotional distress; there was no claim presented on behalf of the fetus. App. 22a.

This case was originally tried in April of 2000, and the trial resulted in a hung jury. App. 22a. The case was re-tried in June of 2000, and the trial resulted in a verdict in favor of Dr. Hirshman and TJUH. App. 22a. Following the defense verdict, plaintiffs filed a Motion for Post-Trial Relief, which was denied by Order dated November 21, 2000. App. 20a. Plaintiffs then filed an appeal with the Pennsylvania Superior Court. Following the filing of briefs and oral argument, a three-Judge Panel of the Court issued a Judgment and Memorandum, dated May 29, 2002, reversing the Judgment entered in favor of defendants and remanding the case for a new, and third, trial. App. 4a-19a.

Defendants filed an Application for Reargument *en banc* and/or for Reconsideration with the Superior Court, which was denied by Order dated July 31, 2002. App. 3a. Defendants then filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. App. 2a. By Order dated December 10, 2002, the Court denied defendants' Petition for Allowance of Appeal. Consequently, defendants filed an Application for Reconsideration with the Supreme Court, which was denied by Order dated February 6, 2003. App. 1a.

Defendants are now filing this Petition for Writ of Certiorari asserting, *inter alia,* that the decisions of the Pennsylvania appellate courts violated their due process rights. Defendants raised the due process argument at their first opportunity, which was with the Supreme Court of Pennsylvania. In this regard, defendants' constitutional rights to due process and fundamental fairness were not violated until the Pennsylvania Superior Court reversed the decision of the trial court, thereby usurping the authority of the trial court and depriving defendants of their constitutionally-protected right to defend against plaintiffs' accusations of fraud, conspiracy and record tampering.

B. FACTUAL HISTORY

On December 20, 1996, when Ms. Bynum was 39 weeks pregnant, she presented to TJUH for a scheduled prenatal visit. She was examined by Dr. Hirshman. Ms. Bynum claims that she informed Dr. Hirshman that she had been experiencing decreased fetal movement since the evening of December 19, 1996. Dr. Hirshman specifically denied this allegation. App. 22a-23a. In fact, a review of the medical records demonstrates that Dr. Hirshman wrote on the prenatal flow record that there was a positive fetal heart rate and active fetal movement. App. 22a-23a. Dr. Hirshman testified that if Ms. Bynum had reported decreased fetal movement, he would have sent her to the labor and delivery area for immediate testing. App. 22a-23a. Instead, Ms. Bynum was advised to return in one week, and an induction was scheduled for December 30, 1996, if Ms. Bynum did not go into spontaneous labor prior to that time. App. 23a.

Ms. Bynum presented to TJUH on the evening of December 23, 1996, complaining of decreased fetal movement since that morning. App. 23a. She was seen by two resident-physicians, Dr. Mass and Dr. Brill, who consulted with Dr. Armstrong, the attending obstetrician on call. App. 23a. An ultrasound was performed, and it was determined that the fetus was dead. App. 23a. Ms. Bynum underwent a Pitocin induction and had a spontaneous vaginal delivery of

a non-viable female infant. Plaintiffs assert that they suffered emotional distress as a result of the birth of the non-viable fetus.

The sole issue in this case was whether Ms. Bynum did, in fact, advise Dr. Hirshman on December 20, 1996, that she had been experiencing decreased fetal movement. The evidence established that if Ms. Bynum advised Dr. Hirshman of decreased fetal movement, it was below the standard of care for Dr. Hirshman not to have ordered immediate follow-up testing. This is the only basis upon which plaintiffs could have successfully maintained a cause of action against defendants.

As noted previously, the parties disagreed as to whether Ms. Bynum advised Dr. Hirshman, on December 20, 1996, that she was experiencing decreased fetal movement. The medical record from the December 20, 1996 office visit supported Dr. Hirshman's testimony, in that it specified that there was positive fetal movement and an active heart rate. App. 22a-23a. Plaintiffs' only response to this evidence was to assert that the medical record must have been altered.

In fact, plaintiffs accused defendants of an elaborate scheme of conspiracy, record tampering and fraud which involved Dr. Hirshman allegedly returning to TJUH at some point after the incident occurred, destroying the original medical record from December 20, 1996, fabricating a completely new record that supported his "version" of the events of December 20, 1996, and having this newly fabricated record signed by an attending physician and placed back into the medical chart.

In order to meaningfully defend against plaintiffs' allegations of fraud and conspiracy, defendants attempted to establish, among other things, that each item in the allegedly fabricated record constituted a true and accurate depiction of Ms. Bynum's medical condition as it existed on December 20, 1996. Included in the medical record was Ms.

Bynum's history of prior pregnancies and the outcome of each. The record demonstrated that one of Ms. Bynum's prior pregnancies had ended in an abortion.

During the trial, defense counsel briefly questioned Ms. Bynum with respect to her prior abortion and concerning the fact that she had considered terminating the pregnancy in issue. The reference to the prior and contemplated abortion was factual in nature and was incredibly limited, consisting of only two pages out of the 700 page trial transcription. App. 32a-33a. Plaintiffs objected, however, asserting that the evidence was irrelevant and inflammatory.

The presiding trial judge assessed the evidence and determined that the accuracy of the medical record, including the history of abortion, was relevant and probative to the issue of liability, particularly since plaintiffs had accused defendants of tampering with the medical record. As such, Ms. Bynum's testimony with respect to all portions of the record that were, in fact, accurate (including the history of abortion) was relevant in order to rebut the allegations of fraud and record tampering. App. 32a. The trial judge also determined that the fact that Mrs. Bynum contemplated aborting the pregnancy in question was relevant to a determination of the issue of damages. Finally, the trial court determined that the evidence of abortion was not prejudicial in that it was not presented in an inflammatory or sensational manner and since reference to the abortion was brief and compassionate. App. 32a-33a.

On appeal, the Superior Court determined that the mere mention of abortion is demonstrably prejudicial due to the fact that the nation is polarized on the issue. App. 10a. Therefore, no matter how minor the reference to abortion was, it constituted reversible error. App. 10a. Defendants filed a further appeal to the Pennsylvania Supreme Court arguing that the Superior Court's decision violated their right to due process, since it left them without a meaningful way to challenge plaintiffs' allegations of fraud, conspiracy

and record tampering. Although the Supreme Court denied defendants' request for further review, defendants firmly believe that the notions of due process and fundamental fairness warrant this Court's review.

ARGUMENT

A. THE DECISIONS OF THE PENNSYLVANIA APPELLATE COURTS VIOLATED DEFENDANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FUNDAMENTAL FAIRNESS BY DETERMINING THAT THE ISSUE OF ABORTION, IN AND OF ITSELF, IS DEMONSTRABLY PREJUDICIAL AND THEREFORE INADMISSIBLE DESPITE THE FACT THAT PLAINTIFFS PLACED THE ABORTION EVIDENCE DIRECTLY IN ISSUE AND DESPITE THE FACT THAT DEFENDANTS WILL EFFECTIVELY BE PRECLUDED FROM DEFENDING AGAINST SERIOUS ALLEGATIONS OF FRAUD AND CONSPIRACY WITHOUT THE EVIDENCE

The Pennsylvania appellate courts denied defendants their due process rights by depriving them of an opportunity to be heard in a meaningful place and in a meaningful fashion and by destroying their ability to defend against serious allegations of fraud and conspiracy. The courts' decisions set a dangerous precedent in that they allow parties to hide behind the allegedly repugnant nature of the very evidence which they themselves have admitted into the record and made the central issue in the case, thereby preventing any other parties aggrieved by the evidence from challenging the same.

In this regard, Ms. Bynum had a constitutionally-protected right to an abortion. She freely chose to place her medical records, which clearly documented her history of an abortion, into evidence and to make the contents of the medical records a central issue in the case. The Pennsylva-

nia appellate courts took a draconian step backwards by ruling that the issue of abortion is so repugnant that even defense counsel's **extremely** limited and sensitive reference to Ms. Bynum's prior and contemplated abortion, which was highly probative of the issues at hand, unduly prejudiced plaintiffs.

The lower appellate courts essentially allowed plaintiffs to raise the issue of abortion and then use it as a shield to prevent Dr. Hirshman and TJUH from defending against serious claims of record tampering, fraud and conspiracy. The courts' rulings violate all notions of due process and fundamental fairness, which are the very cornerstones upon which our legal system is based. This Court's intervention is clearly necessary in order to protect the fundamental rights of Dr. Hirshman and TJUH, as well as those of all other individuals similarly situated.

The "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); *Plowman v. Plowman,* 409 Pa. Super. 143, 597 A.2d 701, 705 (1991). Under Federal law, due process ensures that, absent any valid state justification, competent, reliable and relevant evidence must be admitted to provide procedural fairness and an opportunity to be heard. *Montana v. Egelhoff,* 518 U.S. 37 (1996). The exclusion of such evidence violates fundamental standards of due process and deprives defendants of the basic right to defend themselves. *Id.*

The Pennsylvania appellate courts recognize that due process, a concept deemed "incapable of exact definition," is a "flexible notion" which is intended to "ensure fundamental fairness." *Plowman,* 409 Pa. Super. at 143, 597 A.2d at 705; *see also Rudolph v. Pennsylvania Blue Shield,* 553 Pa. 9, 717 A.2d 508, 510 (1998), *rearg. denied,* 1998 Pa. LEXIS 2337 (Pa. Oct. 28, 1998); *Harmar Ice Associates v. Lignelli,* 546 Pa. 500, 686 A.2d 819, 820 (1996). As the Supreme Court of Pennsylvania has stated:

> Adjudicatory action cannot be validly taken by any tribunal whether judicial or administrative, except upon a hearing wherein each party has an opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence on his own behalf, and to make argument.

Harmar Ice Associates, 546 Pa. at 500, 686 A.2d at 821.

The requirements of due process and fundamental fairness mandate that evidence of Ms. Bynum's prior and contemplated abortion be admitted into evidence. In this regard, the sole issue in this case was whether Ms. Bynum did, in fact, advise Dr. Hirshman on December 20, 1996, that she had been experiencing decreased fetal movement. The evidence established that if Ms. Bynum advised Dr. Hirshman of decreased fetal movement, it was below the standard of care for Dr. Hirshman not to have ordered immediate follow-up testing. This is the only basis upon which plaintiffs could have successfully maintained a cause of action against defendants.

Dr. Hirshman testified that plaintiff never advised him of decreased fetal movement. To the contrary, Dr. Hirshman pointed out that the records from the December 20, 1996 office visit indicate that there was positive fetal movement and an active heart rate. Ms. Bynum testified, however, that she did advise Dr. Hirshman of decreased fetal movement. She further testified that if the medical records indicated the presence of positive fetal movement, then they were fabricated.

As such, in order to hold defendants liable, a jury must first find that the December 20, 1996 medical record (which included evidence of Ms. Bynum's prior abortion) was fabricated. To support their claims of record fabrication and tampering, fraud and conspiracy, plaintiffs accused Dr. Hirshman of returning to TJUH at some point after the incident occurred, destroying the original medical record

from December 20, 1996, fabricating a completely new record that supported his "version" of the events of December 20, 1996, and having this newly fabricated record signed by an attending physician and placed back into the medical chart.

Evidence of defendants' alleged scheme to defraud plaintiffs permeated the entire trial and impacted the testimony of each medical witness. In fact, two records custodians and Dr. Hirshman's supervising physician had to be called as witnesses for the sole purpose of refuting the allegations of record fabrication. The allegations of fraud and conspiracy were also the predominant theme running throughout plaintiffs' counsel's opening and closing statements.

Clearly, a finding of liability would be predicated solely upon which party's version of events the jury chose to believe. Therefore, evidence tending to prove the accuracy of the medical record, including plaintiff's documented past medical history, was highly probative. In order to successfully defend against plaintiffs' allegations, it was necessary for defendants to establish that each item in the allegedly fabricated record constituted a true and accurate depiction of Ms. Bynum's medical condition as it existed on December 20, 1996. Defendants had an absolute right to establish that each item on the December 20, 1996 record was accurate.

Allegations of a conspiracy on the part of the TJUH physicians to defraud plaintiffs and the court cannot be taken lightly, particularly since the success of plaintiffs' case depended ***solely*** upon the jury's acceptance of their allegations of fraud. As such, reference to Ms. Bynum's prior medical history (which was certainly material and probative to the claims being asserted against these defendants) was essential in order to defend Dr. Hirshman's character as well as the veracity of the information contained in the December 20, 1996 medical record.

The notions of due process and fundamental fairness, as well as the rules regarding the admissibility of relevant evidence, require that defendants be permitted to establish the accuracy and contemporaneousness of each element in the medical chart. The lower appellate courts' refusal to permit this narrow and limited cross-examination effectively precludes a proper defense. The resulting prejudice is particularly overwhelming in light of the fact that the reference to the prior abortion was sensitive and was incredibly brief, consisting of only one small part of defense counsel's cross-examination with respect to the accuracy of the entire medical chart.

1. The Pennsylvania Appellate Courts' Decisions Violate All Notions Of Due Process And Fundamental Fairness By Excluding Highly Probative And Non-Inflammatory Evidence Essential To The Defense Against Plaintiffs' Serious Allegations of Fraud, Record Tampering And Conspiracy, As Well As The Alleged Damages For Emotional Distress

The lower appellate courts' decisions were contrary to well-established Pennsylvania case law which provides that although evidence of an abortion might be distasteful and/or potentially inflammatory, it is still admissible, particularly since the evidence was relevant and probative to the claims being espoused by plaintiffs. In this regard, as Pennsylvania's Rules of Evidence direct, "relevant evidence" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa. R. Evid. 401. Likewise, Pennsylvania's Rules of Evidence specify that "[a]ll relevant evidence is admissible, except as otherwise provided by law." Pa. R. Evid. 402; *see Martin v. Soblotney,* 502 Pa. 418, 466 A.2d 1022 (1983). Evidence is admissible "when it is relevant to a fact sought to be proved." *Chicchi v. SEPTA,*

727 A.2d 604, 607 (Pa. Commw. 1999), *app. denied,* 560 Pa. 750, 747 A.2d 371 (1999)(citing *Fernandez v. City of Pittsburgh,* 164 Pa. Commw. 662, 643 A.2d 1176 (1994), *app. denied,* 544 Pa. 637, 675 A.2d 1253 (1996)).

Here, the prior abortion was part of plaintiff's documented medical history, and the accuracy of the medical record, including the history of an abortion, was the central issue, and the overriding theme, in the litigation. The brief testimony concerning Ms. Bynum's prior and contemplated abortion was not presented in an inflammatory or sensational manner. The topic was quickly addressed, with compassion, and was very factually stated. It was not raised in either the opening or closing arguments or in the court's jury instructions. Indeed, the sum total of the testimony regarding the abortion is contained in only two pages of a 700 page trial transcription. This evidence was properly, and necessarily, admitted.

Moreover, in his Concurring and Dissenting Memorandum of May 29, 2002, Pennsylvania Superior Court Judge Michael T. Joyce acknowledged the overwhelmingly relevant and material aspects of the December 20, 1996 medical record and concluded that the probative value of the evidence of plaintiff's contemplated abortion was "not outweighed" by its prejudicial impact. App. 18a-19a. Judge Joyce specifically concluded that excluding evidence of the contemplated abortion would deprive the fact-finder of an accurate picture of Ms. Bynum's emotional disposition towards the fetus. App. 19a. Based on this conclusion, Judge Joyce declared that he would hold that evidence of Ms. Bynum's contemplation of an abortion is admissible for purposes of damages pursuant to Pa. R. Evid. 401 and Pa. R. Evid. 403. App. 19a.

Clearly, evidence with respect to Ms. Bynum's prior and contemplated abortion is relevant and admissible and the trial court's decision to admit this evidence is in complete accord with prior case law emanating from the Pennsylvania Supreme Court. In this regard, the Pennsylvania Supreme

Court has permitted references, during trials, to abortions, or to contemplated abortions, without any allegation of prejudice and without the need for a re-trial. *Commonwealth v. Weber,* 549 Pa. 430, 701 A.2d 531 (1997); *Freedman v. McCandless,* 539 Pa. 584, 654 A.2d 529 (1995); *Farago v. Sacred Heart General Hosp.,* 522 Pa. 410, 562 A.2d 300 (1989); *Commonwealth v. Bundy,* 458 Pa. 240, 328 A.2d 517 (1974); *In re Adoption of Maisels,* 395 Pa. 329, 149 A.2d 38 (1959). As in the above-cited cases, the reference to an abortion herein, was brief, concise, factual and caused no inflammatory reaction from the jurors.

Likewise, Federal courts have permitted references to abortions during a trial where the evidence is relevant. *See Berry v. Deloney,* 28 F.3d 604 (7th Cir. 1994). In *Berry,* the Seventh Circuit Court of Appeals specifically held that evidence concerning the plaintiff's abortions was relevant, since the jury could find that the evidence diminished the amount of the plaintiff's damages for pain, suffering and emotional injuries. *Id.* at 608. In reaching this determination, the Seventh Circuit stated that:

> We are satisfied that the trial court's balance of the probative value of the testimony concerning other sexual relationships and abortions against its potentially prejudicial impact was proper. *When the district court has weighed the probative value of evidence against the potential prejudice we are especially hesitant to reverse a Rule 403 decision. See Scaggs v. Consolidated Rail Corp.,* 6 F.3d 1290, 1296 (7th Cir. 1993).

Id. (emphasis added).

In accordance with both the Pennsylvania and Federal Rules of Evidence, defense counsel's fleeting reference to an abortion was highly relevant and probative, particularly in light of the seriousness of the allegations being asserted by plaintiffs as to fraud, conspiracy and fabrication of the medical record. The trial court properly weighed the

probative value of the evidence against its potential prejudice, in accordance with Pennsylvania Rule of Evidence 403, and admitted the same. The exclusion of this probative and non-inflammatory evidence at a third trial will effectively preclude defendants from defending against plaintiffs' allegations of fraud, conspiracy and record tampering and will deny defendants their due process rights.

2. The Pennsylvania Appellate Courts' Decisions Violate All Notions Of Due Process And Fundamental Fairness By Usurping The Function Of The Trial Court And Concluding That The Issue Of Abortion, In And Of Itself, Is Demonstrably Prejudicial And Inadmissible

Pennsylvania law clearly establishes a stringent standard that appellate courts must adhere to when reviewing the evidentiary rulings of a trial court. It is well established that questions concerning the admission or exclusion of evidence are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *See Jahanshahi v. Centura Development Co., Inc.*, 816 A.2d 1179 (Pa. Super. 2003)(citing *General Equip. Mfrs. v. Westfield Ins. Co.*, 430 Pa. Super. 526, 635 A.2d 173, 182 (1993)). In Pennsylvania, a trial judge has broad discretion regarding the admissibility of potentially misleading and confusing evidence. *Daset Mining Corp. v. Industrial Fuels Corp.*, 326 Pa. Super. 14, 473 A.2d 584, 588 (1984). Pennsylvania courts have consistently held that evidentiary rulings are better left to the discretion of the trial court, which has the ability to hear the testimony and to see the witnesses, rather than to the appellate courts, which must reach their own conclusions based upon a cold review of the record. *Id.*

Instantly, the Pennsylvania Superior Court bypassed, or even ignored, the trial court's balancing test, which was appropriately conducted in accordance with Pennsylvania

Rule of Evidence 403, and conclusively determined, based upon a cold review of the record, that the abortion evidence was demonstrably prejudicial. As demonstrated above, however, abortion evidence is not demonstrably prejudicial or repugnant, and it is properly admitted when, as in this case, it is probative of the issues at bar.

In fact, the lower appellate court decisions are in conflict with the Pennsylvania Superior Court's prior finding in *Hutchison v. Luddy,* 763 A.2d 826 (2000), *app. denied,* 567 Pa. 743, 788 A.2d 377 (2001), wherein the court recognized that although the repugnant nature of certain behavior, such as child molestation, renders it inherently inflammatory, it is nonetheless admissible if it is relevant. Specifically, in *Hutchison,* the plaintiff, a minor male with limited mental capacity, claimed that the defendant-priest had sexually molested him over the course of six years, beginning when he was ten years old. *Id.* at 830. The defendant-priest denied the allegations. *Id.* As a result, the plaintiff sought to introduce evidence that the defendant had molested other children.

The defendant asserted that prior instances of his pedophilic behavior with children other than the plaintiff were not admissible, since this evidence had only slight probative value and would be unduly prejudicial and likely to confuse the jury. *Id.* at 839. The trial court disagreed and admitted the evidence. On appeal, the Superior Court affirmed, noting that the admission of the evidence was critical, since the credibility of the victim's testimony was being attacked. *Id.* at 842. In so ruling, the Superior Court specifically stated that although the evidence of molestation and pedophilic behavior was obviously repugnant and distasteful, and potentially inflammatory, this type of evidence in child abuse and rape cases is always repugnant. *Id.* The fact that evidence is repugnant and potentially inflammatory does not render it inadmissible. *Id.; see also Commonwealth v. McMaster,* 446 Pa. Super. 261, 666 A.2d 724 (1995) (Superior Court affirmed the admission of

inflammatory evidence that a throat culture taken from the four year old victim of sexual molestation had tested positive for the presence of gonorrhea despite the fact that there was no evidence that defendant had ever had gonorrhea and despite the fact that it could not be established when the victim had become infected. The evidence was offered to establish that the child was molested, and the prejudice caused to the defendant by inflammatory nature of the evidence was immaterial.); *Commonwealth v. Luktisch*, 451 Pa. Super. 500, 680 A.2d 877 (1996), *reh'g. denied* (Pa. Super. Sept. 6, 1996)(defendant was charged with molesting his stepdaughter; uncharged acts of molestation by defendant on his natural daughter fourteen years prior held to be admissible when victim's credibility undercut by defense testimony).

Similarly, the fact that the issue of abortion is repugnant to certain people and potentially inflammatory, does not render relevant testimony regarding the same inadmissible. Simply put, the prior abortion was a part of Ms. Bynum's documented medical history, and the accuracy of that medical record, including the history of an abortion, was the central issue in the case. Moreover, the testimony concerning Ms. Bynum's prior and contemplated abortion was not presented in an inflammatory or sensational manner. The issue was addressed briefly, compassionately and in a very factual manner. It was not raised again in closing arguments or in the court's instructions to the jury.

As such, the trial court was in the best position to determine the admissibility of potentially inflammatory evidence. It is quite a draconian measure for an appellate court to disregard a trial court's balancing test and conclude, based upon a cold review of the record, that relevant evidence of abortion is demonstrably prejudicial and inadmissible due to the fact that the abortion issue polarizes our nation and may raise a negative inference in the minds of some. In this circumstance, the reference to abortion was overwhelmingly relevant in light of the scope

and seriousness of the allegations of record fabrication. Defendants' constitutional rights to due process and fundamental fairness have been destroyed as a result of the lower appellate court decisions and review by this Court is warranted in order to protect the rights of defendants and all others similarly situated.

B. THE DECISIONS OF THE PENNSYLVANIA APPELLATE COURTS VIOLATED DEFENDANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FUNDAMENTAL FAIRNESS BY RULING THAT IT IS PERMISSIBLE TO LET A JURY INFER CONSPIRACY WITHOUT PLAINTIFFS HAVING PLED OR PROVEN THE SAME AND WITHOUT GIVING DEFENDANTS THE OPPORTUNITY TO FULLY AND COMPLETELY RESPOND TO THE ALLEGATIONS OF THE CONSPIRACY

In order to state a civil action for conspiracy, plaintiffs were required to allege: "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage." *See McGuire v. Shubert,* 722 A.2d 1087, 1092 (Pa. Super. 1998), *app. denied,* 560 Pa. 707, 743 A.2d 921 (1999)(citing *Kadel v. McMonigle,* 425 Pa. Super. 253, 624 A.2d 1059, 1063 (1993), *app. denied,* 539 Pa. 652, 651 A.2d 539 (1994)).

Instantly, plaintiffs neither pled nor proved that any conspiracy actually existed amongst these healthcare providers. However, once the jury was led to believe that such a conspiracy, and related fraud, took place, surely the healthcare providers were entitled to defend themselves through the full, and unencumbered, use of the December 20, 1996 medical record. A review of the trial transcription reveals that plaintiffs' allegations, pertaining to conspiracy and fraud, permeated the entire record including, but not

limited to, plaintiffs' counsel's opening and closing arguments as well as the testimony of most witnesses.

It was essential to plaintiffs' case that the jury accept their proposition that defendants conspired to fabricate a new medical record for the December 20, 1996 office visit. For this reason, plaintiffs' counsel's cross-examination of Dr. Hirshman focused not on the medical evidence, but on when Dr. Hirshman learned of the death of the fetus and why Dr. Hirshman's record, from the December 20, 1996 office visit, did not appear to be consistent with the remainder of plaintiff's medical record from the Outpatient Clinic.

Since the jury was permitted to consider the bald allegations of conspiracy, defendants were entitled to demonstrate the accuracy of all information in the record, including the prior abortion. To prohibit a defense to plaintiffs' claims of conspiracy presents a dramatic departure from the long-standing law in Pennsylvania and violates defendants' right to due process, thereby requiring a full and complete evaluation by this tribunal.

C. PLAINTIFFS WAIVED THEIR RIGHT TO CHALLENGE THE TRIAL COURT'S ADMISSION OF THE ABORTION EVIDENCE SINCE THEY BROUGHT MS. BYNUM'S MEDICAL RECORDS, WHICH INCLUDED REFERENCE TO HER PRIOR ABORTION, INTO QUESTION BY ALLEGING THAT DEFENDANTS FRAUDULENTLY ALTERED THE MEDICAL RECORDS, AND THEN FAILED TO REQUEST A MISTRIAL OR A CAUTIONARY INSTRUCTION AS TO THIS EVIDENCE

Plaintiffs themselves placed Ms. Bynum's medical history, including her history of abortion, directly in issue when they alleged that Dr. Hirshman destroyed the original medical record and fabricated a new record in support of his

"version" of the events in question. Surely, plaintiffs cannot be permitted to place the medical record before the jury and argue that it was fraudulently fabricated and then deprive defendants of their right and opportunity to prove the accuracy of the very contents that were allegedly fabricated.

Indeed, if plaintiffs sincerely believed that they were being unfairly prejudiced by the brief reference to an abortion, they could have, but did not, request a cautionary instruction and a mistrial. In this vein, the Pennsylvania appellate courts' rulings directly conflict with Pennsylvania's doctrine of waiver. Pennsylvania's Appellate Rules of Procedure, case law and commentary clearly provide that in order to properly preserve an issue for review, a party must make timely, specific objections at the trial court level and continue to raise and brief those issues, throughout the post-trial and appellate levels of litigation. Pa. R. App. P. 302; *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974); *see also* G. Ronald Darlington, *et al.*, 1 *Pennsylvania Appellate Practice*, §302:1 (2d ed. 2002).

Case law clarifies that in order to properly preserve a question for review, a party must make a timely, specific objection before the trial court and must have a full record relating to same. *Dilliplaine, supra.* Issues which are not properly preserved for review cannot be considered by an appellate tribunal, even though the alleged error may be basic or fundamental. *P.C.S. v. J.E.B.*, 442 Pa. Super. 388, 659 A.2d 1043, 1048 (1995), *reh'g denied* (Aug. 8, 1995); *see also Allied Electrical Supply Co. v. Roberts*, 797 A.2d 362, 365 (Pa. Super. 2002), *app. denied*, 808 A.2d 568 (Pa. 2002); *Kelly v. St. Mary Hospital*, 778 A.2d 1224, 1227-1228 (Pa. Super. 2001). Strict compliance with the procedures designed for issue preservation has been deemed essential in order to maximize the efficiency of the courts and to maintain and enhance the quality of the dispute resolution process. *Tagnāni v Lew*, 493 Pa. 371, 426 A.2d 595 (1981).

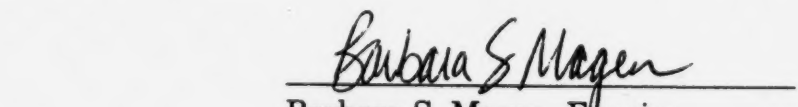
Instantly, since plaintiffs' counsel did not request a mistrial at the time that the reference to an abortion was

made, plaintiffs have waived their right to have a new trial conducted on the basis of the alleged error committed by the trial court. *Coffey v. Minwax Co., Inc.*, 764 A.2d 616, 622 (Pa. Super. 2000) (Superior Court concludes that where the plaintiffs had not asked for a mistrial or requested a cautionary instruction, they were not entitled to relief on the claim due to the waiver doctrine). As such, in the case at bar, the Superior Court's ruling, as well as the Supreme Court of Pennsylvania's corresponding denial of defendants' Petition for Allowance of Appeal, are in direct conflict with Pennsylvania's doctrine of waiver and the courts' decisions deprive defendants of their due process right to be heard in a meaningful manner, thereby warranting this Court's intervention.

CONCLUSION

For the foregoing reasons and in the interest of justice, Dr. Hirshman and TJUH respectfully request that this Court grant the instant Petition and accept this appeal.

Respectfully Submitted,



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Attorney for Petitioners

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

DIANE BYNUM and FOUNTAIN PARRISH,	: No. 418 EAL 2002
	: Application for Reconsideration
	: of denial of Petition for
v.	: Allowance of Appeal
THOMAS JEFFERSON UNIVERSITY HOSPITAL and DR. PHILIP HIRSHMAN AND HEE-OK PARK CHAI, M.D.,	:
PETITION OF: THOMAS JEFFERSON UNIVERSITY HOSPITAL and DR. PHILIP HIRSHMAN, M.D.	:

ORDER

PER CURIAM

AND NOW, this 6th day of February 2003, the Application for Reconsideration of the Denial of the Petition for Allowance of Appeal is **DENIED.**

TRUE COPY FROM RECORD

Attest: FEB 6 2003

/s/ Patricia Johnson

Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

DIANE BYNUM and FOUNTAIN PARRISH,	:	No. 418 EAL 2002
	:	
	:	Petition for Allowance of
Respondents	:	Appeal from the Order of the
	:	Superior Court
	:	
v.	:	
	:	
	:	
THOMAS JEFFERSON UNIVERSITY HOSPITAL and DR. PHILIP HIRSHMAN AND HEE-OK PARK CHAI, M.D.	:	
	:	
PETITION OF: THOMAS JEFFERSON UNIVERSITY HOSPITAL and DR. PHILIP HIRSHMAN, M.D.,	:	
	:	
	:	

ORDER

PER CURIAM

AND NOW, this 10th day of December 2002, the Petition for Allowance of Appeal is DENIED.

TRUE COPY FROM RECORD

Attest: DEC 10 2002

/s/ Patricia Johnson

Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

DIANE BYNUM AND FOUNTAIN PARRISH,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
THOMAS JEFFERSON UNIVERSITY HOSPITAL AND DR. PHILIP HIRSCHMAN AND Hee-PK PARK CHAI, M.D.,	:	
Appellees	:	No. 3485 EDA 2000

ORDER

AND NOW, this 31st day of July, 2002, IT IS HEREBY ORDERED:

THAT the application filed June 12, 2002, requesting reargument/reconsideration of the decision dated May 29, 2002, is DENIED.

PER CURIAM

DIANE BYNUM and FOUNTAIN PARRISH,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
	:	
v.	:	
	:	
THOMAS JEFFERSON UNIVERSITY HOSPITAL and DR. PHILIP HIRSCHMAN and Hee-OK Park Chai, M.D.	:	No. 3485 EDA 2000
	:	

Appeal from the Judgment entered February 12, 2001, Court of Common Pleas, Philadelphia County, Civil Division at Nos. 923 March Term, 1998 & 2294 December Term, 1998.

BEFORE: McEWEN, JOHNSON, and JOYCE, JJ.

MEMORANDUM: **FILED MAY 29, 2002**

Diane Bynum (Bynum) and Fountain Parrish (Parrish), husband and wife, appeal from the judgment entered in a medical malpractice case after the trial court denied their post-trial motions. Bynum and Parrish allege that, as a result of the negligence of Dr. Philip Hirshman, their fetus was stillborn. Bynum and Parrish sought damages for emotional distress. Bynum and Parrish contend that the trial court erred in permitting testimony that Bynum had aborted a prior pregnancy and had considered aborting the pregnancy at issue. Additionally, Bynum and Parrish assert that the trial court improperly removed Hospital's name from the jury interrogatories, that the trial court's conduct during trial hampered Bynum and Parrish's counsel's exercise of trial strategy, and that the court improperly imposed a deadline for the jury's deliberations. We conclude that the testimony concerning the prior and contemplated abortions was unduly prejudicial, and therefore, we reverse the judgment and remand for a new trial.

This case arises from the stillbirth of Bynum's fetus in December 1996. Bynum's expected due date was December 23, 1996. On December 20, 1996, Bynum saw Dr. Hirshman, a third year OB/GYN resident at Thomas Jefferson University Hospital (Hospital), for a prenatal visit. During

the visit, Dr. Hirshman indicated a positive fetal heartbeat and fetal movement on the prenatal flow record. He instructed Bynum to return in one week to be induced if she had not gone into spontaneous labor. Bynum contends that during the visit she told Dr. Hirshman that she had experienced decreased fetal movement. Dr. Hirshman denies that Bynum told him and asserts that if Bynum had told him that she experienced decreased fetal movement then he would have performed more tests prior to sending her home. On December 23, 1996, Bynum went to Hospital complaining that she had not felt any fetal movement since that morning. An ultrasound ndicated that the fetus had died *in utero*. Bynum and Parrish sought damages for emotional distress. Bynum and Parrish admit that there is no evidence of Hospital's independent liability and their only claim against Hospital is one of vicarious liability.

Bynum and Parrish filed suit against a number of defendants. In September 1999, the court consolidated the cases, and the parties stipulated to the dismissal of all defendants other than Hospital and Dr. Hirshman. Bynum claimed that she informed Dr. Hirshman that the fetus was moving less on the day of the prenatal visit and that Dr. Hirshman's failure to take further action caused the stillbirth. The only claims against Hospital were those of vicarious liability for the actions of Dr. Hirshman who was a resident doctor and a Hospital employee. Bynum and Parrish sought damages for emotional distress resulting from how they learned that their baby was stillborn. In April 2000, the original trial of this case ended in a hung jury.

During the jury trial in June 2000, the Honorable Mark I. Bernstein permitted testimony concerning Bynum's prior abortion and her consideration of aborting the pregnancy in question. Additionally, the trial court instructed defense counsel regarding discourtesy and proper questioning. The trial court also refused to include jury interrogatories requested by the plaintiffs regarding Hospital's liability. At the conclusion of the trial, the trial judge told the jury

that due to a personal commitment the judge would be leaving the courthouse at approximately 3:30 that day and therefore would only be able to receive the verdict either before he left that afternoon or the next morning. The judge made it clear to the jury that they could deliberate for as long as they needed. The jury returned their verdict at 3:50 finding Dr. Hirshman not negligent in his medical care. Bynum and Parrish filed this timely appeal after the trial court denied Bynum and Parrish's motion for post-trial relief.

Bynum and Parrish present the following issues for our review:

1. Whether trial court committed reversible error in permitting testimony concerning [Bynum's] termination of a previous pregnancy in 1992?

2. Whether the trial court committed reversible error in permitting testimony concerning [Bynum's] consideration of the termination of this pregnancy by abortion?

3. Even if issues concerning the previous abortion and consideration of abortion are relevant, it was still excluded pursuant to Rule 403 of the Rules of Evidence and it was reversible error to permit cross-examination.

4. Whether trial court improperly removed [Hospital's] name from the jury interrogatories?

5. Whether trial court's constant attack of counsel for defendant improperly prevented plaintiffs' counsel from determining in his discretion when to object to certain points or to exercise any trial strategy and improperly disrupted trial?

Brief for Appellant at 4.

We will not overturn a decision to grant or deny a motion for a new trial unless the trial court "grossly abused its discretion or committed an error of law that controlled

the outcome of the case." ***Collins v. Cooper,*** 746 A.2d 615, 617 (Pa. Super. 2000).

Bynum and Parrish's first three questions concern the admissibility of evidence regarding Bynum's prior abortion and her contemplated abortion of the pregnancy in question. As these questions are interrelated, we will address them together.

We recently elaborated on the standard for reviewing the admissibility of evidence:

> In order to find that the trial court's evidentiary rulings constituted reversible error, such rulings must not only have been erroneous but must also have been harmful to the complaining party. Appellant must therefore show error in the evidentiary ruling and resulting prejudice, thus constituting an abuse of discretion by the lower court. Based upon such showing, our only remedy is to grant a new trial.

Collins v. Cooper, 746 A.2d 615, 619-620 (Pa. Super. 2000) (internal quotations and citations omitted).

Bynum and Parrish first contend that the testimony concerning the prior abortion and the contemplated abortion was not relevant to the issues in the case, and therefore inadmissible. Brief for Appellants at 13. Bynum and Parrish contest the court's conclusion that the evidence was relevant to damages. They further object to the implication that they suffered less from the loss of their child than would a plaintiff who had not previously had an abortion. Brief for Appellants at 13.

Additionally, Bynum and Parrish contest the trial court's second rationale for admitting the evidence. Brief for Appellants at 15. The trial court concluded that Bynum and Parrish had placed the records at issue through allegations of alteration or inaccuracy. Trial Court Opinion, 5/16/01, at 10-11. The court concluded accordingly that all

parts of the records were relevant including those that referenced prior pregnancies. Trial Court Opinion, 5/16/01, at 10-11. Bynum and Parrish contend that they did not allege that the records had been altered but rather that information, such as Bynum's name and details of the December 20, 1996 prenatal visit had not been recorded accurately. Brief for Appellants at 15.

Alternatively, Bynum and Parrish assert that, even if the testimony was relevant, the issue of abortion is inherently prejudicial and should only be allowed when it directly impacts the issues in the case. Brief for Appellants at 16. Plaintiffs claim that "[a]ny consideration of the issues surrounding abortions are tainted with unfair prejudice as it has nothing to do with liability [or] the emotional distress that [Bynum] suffered. It did have to do with how certain jurors would view [Bynum] and her value of life." Brief for Appellants at 20-21. Bynum and Parrish contend that the purpose of the testimony was to "inflame and prejudice and affect [Bynum's] credibility and it should not have been allowed pursuant to rules 402 and 403 of the Pennsylvania Rules of Evidence." Brief for Appellants at 13-14. Bynum and Parrish contend that the jurors' decision on negligence rested on whether they believed Bynum or Dr. Hirshman's testimony regarding whether Bynum mentioned decreased fetal movement at the prenatal visit. Therefore, if the abortion testimony prejudiced the jury's opinion of Bynum and thus her credibility, the admission of the testimony is reversible error. Brief for Appellants at 17-18, 19-20. Bynum and Parrish assert that the abortion testimony should have been excluded under Rule 403 of the Pennsylvania Rules of Evidence because the probative value was outweighed by the danger of unfair prejudice.

Our Rules of Evidence state that all relevant evidence is admissible, unless otherwise provided, and that evidence that is not relevant is inadmissible. ***See*** Pa.R.E. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. A trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury." ***Fisher v. N. Hills Passavant Hosp.,*** 781 A.2d 1232, 1234 (Pa. Super. 2001). Evidence will be deemed unduly prejudicial "not where it merely hurts a party's case, but where it tends to fix a decision which has an improper basis in the minds of the jury." ***Id.*** at 1234 (quotations and citations omitted); ***see also*** Pa.R.E. 403.

Hospital and Dr. Hirshman present us with cases in which courts admitted testimony relating to abortions. Brief for Appellees at 15-16. Upon review of the cases, however, we conclude that they are inapposite. A number of the cases involve medical malpractice claims against doctors who performed ineffective abortions or against doctors or individuals whose alleged negligence caused the plaintiffs to have an abortion. ***See e.g. Speck v. Finegold,*** 439 A.2d 110 (Pa. 1981) (involving claim against doctor who preformed ineffective vasectomy and abortion); ***Coveleski v. Bubnis,*** 634 A.2d 608 (Pa. 1993) (involving car accident where mother sought damages for wrongful death of eight week old fetus whom she aborted for fear of damage as a result of accident). In these cases, the testimony regarding the plaintiffs' abortions was essential to the plaintiffs' case due to the fact pattern of the cases and the basis of the claims.

In the case at hand, the trial court determined that the abortion testimony was relevant to the jury's determination of the amount of damages to award. We disagree. The trial court based its relevancy conclusion on mere speculation that a prior abortion would effect the suffering felt after the loss of an entirely separate pregnancy. We discern no correlation between an abortion four years prior and the degree of emotional distress parents would feel upon hearing that their full term baby had died *in utero* after a

subsequent pregnancy. The defendants did not present evidence that the prior abortion was a voluntary act by Bynum. Additionally, we see no relevance in Bynum's contemplation of abortion in the early months of the pregnancy in question. Once the parents determined to carry the pregnancy to term, they negated by their conduct any prior intent to abort, as a consequence of which the prior contemplation is irrelevant.

Additionally, we find no relevance in testimony regarding the prior abortion or the contemplation of the pregnancy to the issue of accuracy of the records, which the trial court asserts in its 1925(a) opinion. The fact that the medical history form correctly reflected the number "3" in the prior pregnancy box does not provide any relevant information to the issues in this case. The accuracy of the records could have easily been established without reference to the small section of the record concerning prior pregnancies. Therefore, we conclude that the testimony should have been excluded as not relevant pursuant to Pa.R.E. 401 and 402.

Even if the testimony could be deemed relevant, the trial court nonetheless erred because the testimony was unduly prejudicial. The outcome of this case depended substantially on whether the jury believed Bynum, as opposed to Dr. Hirshman, when she said she told Dr. Hirshman that she had noticed decreased fetal movement during her last pre-natal visit. Currently this nation is polarized on the issue of abortion with some members of our community exhibiting extreme negative reactions to women who have abortions or to persons who advocate for a woman's right to choose an abortion. We conclude in view of this circumstance that the references to abortions may likely have fixed a "decision which [had] an improper basis in the minds of the jury." ***Fisher,*** 781 A.2d at 1234 (quotations and citations omitted). Although we recognize that the testimony was not lengthy, we conclude that its inclusion was demonstrably prejudicial. Considering the

minor relevance, if any, of the abortion testimony to the facts of this case, we conclude that the probative value did not outweigh the prejudice of the testimony to Bynum and thus should have been excluded pursuant to Pa.R.E. 403. Pa.R.E. 403 ("Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. . . ."). Therefore, we conclude that a new trial is necessary to correct the trial court's abuse of discretion in allowing the testimony regarding the prior and contemplated abortions.

In their fourth issue, Bynum and Parrish contend that the trial court erred by removing Hospital's name from the jury interrogatories. We have previously stated our standard of review of a trial court's decision to grant or refuse a request for special interrogatories:

> Generally, a trial judge in Pennsylvania may grant or refuse a request for special findings on the basis of whether such would add to the logical and reasonable understanding of the issue. We will not disturb a trial judge's decision to grant or refuse the request absent an abuse of discretion.

Century 21 Heritage Realty, Inc. v. Bair, 563 A.2d 114, 116 (Pa. Super. 1989).

Bynum and Parrish contend that the trial court erred in omitting Hospital's name from the jury interrogatories. Brief for Appellants at 23. Bynum and Parrish argue that Hospital should have been included on the interrogatories because under the doctrine of vicarious liability the master may be primarily liable. Brief for Appellants at 23. Bynum and Parrish further contend that the trial court incorrectly concluded that Bynum and Parrish needed to present evidence of direct liability in order to keep Hospital on the interrogatory. Brief for Appellants at 24. "[Hospital] was not a guarantor for defendant Hirshman but a co-defendant liable in its own right." Brief for Appellants at 24. Additionally, the plaintiffs note that the jury did question

the interrogatories: "Are we to view [Hospital] and Dr. Hirshman as one entity to decide our verdict?" Brief for Appellant at 25 quoting N.T., 6/8/00, at 699-700. Bynum and Parrish contend that the interrogatories confused the jurors when Hospital was included in the case caption but not the interrogatories.

The trial court refused to include Hospital's name on the jury interrogatories because Bynum and Parrish had not presented any evidence concerning any direct liability by Hospital but only claimed that Hospital was liable through its agent, Dr. Hirshman. Trial Court Opinion at 3-4. The court concluded that to allow the jury "to determine whether [Hospital] was independently liable, when there was no evidence of independent liability, would only invite a finding of direct liability where even plaintiffs concede there was no evidence to support such a verdict." Trial Court Opinion, 5/16/01, at 5. Therefore, any interrogatory regarding direct liability "would invite confusion or worse, an inconsistent verdict unsupported by any evidence." Trial Court Opinion, 5/16/01, at 6. The trial court in this case clearly instructed the jury that any verdict against Dr. Hirshman would be molded to include Hospital as the doctor's employer. N.T. 6/8/00, at 694. The trial court answered in the affirmative the jury's question as to whether they should treat Dr. Hirshman and Hospital as one entity. N.T. 6/8/00, at 698. Hospital in no way contested the relationship with Dr. Hirshman. Trial Court Opinion at 5. Additionally, Bynum and Parrish do not cite any authority for the argument that they had a legal right to have Hospital on the interrogatories. Therefore, we conclude that the trial court did not abuse its discretion when it granted Hospital's request to remove its name from the jury interrogatories.

Bynum and Parrish additionally allege that the conduct of the trial court during trial was prejudicial to their case. Bynum and Parrish contend that the repeated interruptions and sidebars called by the court to instruct defense counsel

disrupted the trial and prevented plaintiffs' counsel from exercising his trial strategy. Bynum and Parrish contend that their trial counsel's opportunity to object was taken away and that the court's actions "'made plaintiffs' trial counsel appear incompetent and as if the trial court was protecting [plaintiff's] counsel." Brief for Appellant at 28. Bynum and Parrish claim that this conduct denied them their state and federal rights to counsel. Brief for Appellant at 29.

Bynum and Parrish however failed to raise the issue of trial court's prejudice prior to the verdict. Therefore, pursuant to Rule of Civil Procedure 227.1(b), plaintiffs have waived this issue. ***See Ware v. U.S. Fidelity and Guaranty Co.,*** 577 A.2d 902, 904-905 (Pa. Super. 1990) (concluding that prejudice of judge is waived unless raised prior to verdict).

Although the plaintiffs do not include the issue in their statement of questions presented, plaintiffs contend that the trial court committed reversible error regarding the "3:30 deadline". Brief for Appellant at 30-31. Plaintiffs contend that the imposition of the deadline and the requirement that if the jury did not decide before 3:30 p.m. they would have to return the next day was improper and caused the jury to rush to judgment. Brief for Appellant at 30-31. Plaintiffs contend this amounted to judicial coercion. Brief for Appellant at 30-31.

We first note that an appellant waives any question not contained in the statement of questions. ***See*** Pa.R.A.P. 2116(a). Additionally, even if the plaintiffs had included the deliberation deadline question in their statement of questions, we would waive the question because plaintiffs failed to make an objection to the jury instructions or raise the issue prior to the conclusion of the trial in violation of the Rules of Civil Procedure 226 and 227.1(b) respectively. Additionally, even if we were to address the merits of the issue, the record belies Bynum and Parrish's assertion of coercion. The trial court made it clear to the jurors that they

should not feel a need to conclude their deliberation by 3:30 and could feel free to return the next day to continue to deliberate. N.T. 6/8/00, at 695. For all the foregoing reasons, we conclude that the question regarding the "deadline" is meritless.

Because we have concluded that the admission of the testimony regarding the prior and contemplated abortions was error mandating a new trial, we reverse the judgment and remand for a new trial.

Judgment **REVERSED.** Case **REMANDED** for further proceedings consistent with this Memorandum. Jurisdiction **RELINQUISHED.**

Judge McEwen concurs in the result.

Judge Joyce files a Concurring and Dissenting Memorandum.

Judgement Entered.

/s/_____
Prothonotary

Date: MAY 29 2002

DIANE BYNUM AND FOUNTAIN PARRISH,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
	:	
v.	:	
	:	
THOMAS JEFFERSON UNIVERSITY HOSPITAL AND DR. PHILIP HIRSCHMAN AND HEE-OK PARK CHAI, M.D.,	:	
Appellees	:	No. 3485 EDA 2000

Appeal from the Judgment entered February 12, 2001, In the Court of Common Pleas, Philadelphia County, Civil Division at Nos. 923 March Term, 1998 & 2294, December Term 1998.

BEFORE: MCEWEN, JOHNSON and JOYCE, JJ.

FILED MAY 29, 2002

CONCURRING AND DISSENTING MEMORANDUM BY JOYCE, J.

While I am in agreement with the resolution of Appellants' first, fourth and fifth issues, I write separately to express my disagreement with the resolution of the second and third issues.

These issues are as follows:

> II. Whether the trial court committed reversible error in permitting testimony concerning [Ms. Diane Bynum's] consideration of the termination of this pregnancy by abortion?
>
> III. Even If issues concerning . . . consideration of abortion are relevant, it was [sic] still excluded pursuant to Rule 403 of the [Pennsylvania] Rules of evidence and it was reversible error to permit cross examination.

Brief for Appellants, at 4.

At trial, the critical question was whether or not Appellant,[1] Ms. Diane Bynum informed Dr. Phillip Hirshman, during the December 20, 1996 prenatal visit, that she was experiencing decreased fetal movement. During the prenatal visit, Dr. Hirshman indicated in the prenatal flow record that the fetus had a positive heartbeat. The flow record also indicated fetal movement. After making these observations, Dr. Hirshman instructed Ms. Bynum to return in one week to be induced if she had not gone into spontaneous labor. Ms. Bynum contends that during the prenatal visit she told Dr. Hirshman that she was experiencing decreased fetal movement. Dr. Hirshman denies that Ms. Bynum told him of the decreased movement. He claims that had Ms. Bynum informed him of the decreased movement, he would have performed more tests prior to sending her home.

Thus, on the issue of liability, the jury was required to determine whether or not Ms. Bynum informed Dr. Hirshman that she was experiencing decreased fetal movement. If Dr. Hirshman was so informed but he failed to take proper action and sent Ms. Bynum home instead, the jury could reasonably find him negligent. If on the other hand, Dr. Hirshman was not informed of the decreased fetal movement, the jury could conclude that his failure to perform more tests or take other action did not fall below the applicable standard of care. Thus on the issue of liability, *i.e.*, failure to adhere to the proper standard of care, the fact that Ms. Bynum has had a previous abortion or the fact that she contemplated abortion in the early stages of the pregnancy at issue here, is clearly irrelevant.

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1 The other Appellant is Mr. Fountain Parrish. Appellants are the "parents" of the stillborn fetus. **See** Plaintiffs' Complaint, filed 3/12/1998, at ¶ 10.

With respect to damages[2] however, I think that Ms. Bynum's contemplation of abortion in the early stages of the pregnancy is very relevant. Ms. Bynum's testimony established that she considered terminating the pregnancy at issue in this case, voluntarily and for reasons unrelated to her health or physical well-being or those of the fetus. The pertinent testimony elicited on cross-examination concerning the contemplation of abortion is as follows:

> Q: And then ma'am [your medical record] indicates, "Would pregnancy be a problem at this time?" And, again, this is the pregnancy that we're talking about in this case. And you indicated, "Yes." Do you recall that ma'am?
>
> Mr. Keenheel [Appellants' counsel]: Objection, Your Honor.
>
> The Court: Legal basis?
>
> Mr. Keenheel: Irrelevant.
>
> The Court: Overruled. You may answer the question.
>
> A [Ms. Bynum]: Yes, that's it.
>
> Q: And then, ma'am, [your medical record] indicates "Complaints; Symptoms." It indicates, "She's considering terminating pregnancy." Did you tell that to the Family Planning Clinic with regard to this pregnancy; that after you learned

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2 Appellants' claim for damages was premised on emotional distress:

> ¶ 88. The conduct of each defendant was extreme and outrageous, and intentionally or recklessly caused plaintiffs to suffer emotional distress.
>
> ¶ 89. The defendants engaged in such conduct with knowledge that severe emotional distress was certain or substantially certain to result from their conduct.
>
> ¶ 90. By reason of the foregoing, each defendant is liable to the plaintiffs for the severe emotional distress incurred.

Plaintiffs' Complaint, Filed 3/12/1998, at ¶ 88 - ¶ 90.

> that you were pregnant, that you were considering another abortion?
>
> A: Yes sir. I was surprised to find that I was pregnant. I went for – to take birth controls; and they told me I was pregnant. I was in college. So I was surprised. But, obviously, that wasn't my choice.

N.T. 6/5/2000, at 126-127

Ms. Bynum's contemplation of abortion indicates the value she placed on the fetus; the value placed on the fetus impacts on how emotionally distressed, if at all, Ms. Bynum would be upon losing the fetus. If Ms. Bynum placed so little value on the fetus that she contemplated aborting the fetus, then her level of emotional distress would not be the same as that of a woman who valued the fetus all through the pregnancy and never contemplated an abortion at any stage. Even though Ms. Bynum ultimately decided not to abort the fetus, her earlier contemplation of abortion sheds some light on her emotional disposition towards the fetus.

Since Appellants are seeking damages for emotional distress for the stillbirth of the fetus, their emotional disposition towards the fetus as well as the value they placed on the fetus at every stage of the fetal development, is highly relevant. An illustration would buttress this point more forcefully: It is common knowledge that smoking, consumption of alcohol and illegal narcotics are detrimental to fetal health, development and well being. If a pregnant woman engaged in these activities at any stage of her pregnancy, it is reasonable to conclude that this conduct reflects on the value she placed on the fetus. Individuals normally do not harm things or persons they value or care about. Along these lines, in the case at bar, Ms. Bynum's contemplation of harming or aborting the fetus earlier in the pregnancy is relevant to the determination of her emotional disposition towards the fetus. ***See*** Pa.R.E. 401 (" 'Relevant evidence' means evidence having any tendency

to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

Admittedly, evidence of Ms. Bynum's consideration of abortion is prejudicial. However, the probative value of this relevant evidence is not outweighed by its prejudicial effect. ***See*** Pa.R.E. 403 ("Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). Indeed, excluding this evidence would deprive the fact-finder of an accurate picture of Ms. Bynum's emotional disposition towards the fetus. Thus, I would hold that evidence of Ms. Bynum's contemplation of an abortion is admissible for purposes of damages pursuant to Pa.R.E. 401 and Pa.R.E. 403.

Because the trial in this case was not bifurcated, I cannot conclude that the admission of evidence regarding the contemplated abortion was erroneous. In my view, this is a case that loudly cries out for bifurcation between the liability phase and the damages phase. Therefore, I would remand for a new trial with instructions that the trial be bifurcated. At the liability phase, the evidence of the contemplated abortion is clearly inadmissible. For purposes of damages, however, I reiterate my view that the evidence is relevant and admissible.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

DIANE BYNUM FOUNTAIN PARRISH	: DECEMBER TERM, 1998
vs.	:
THOMAS JEFFERSON UNIVERSITY HOSPITAL	: NO. 2294

ORDER

AND NOW, this 21st day of November, 2000, it is hereby ORDERED and DECREED that Plaintiff's Post Trial Motions are DENIED.

BY THE COURT

/s/ MARK I. BERNSTEIN, J.
MARK I. BERNSTEIN, J.

DIANE BYNUNM AND FOUNTAIN PARRISH	: COURT OF COMMON PLEAS : PHILADELPHIA COUNTY, PA
v.	:
THOMAS JEFFERSON UNIV. HOSPITAL AND PHILIP HIRSHMAN, M.D.	: : DECEMBER TERM 1998 : NO. 2294

OPINION

By this appeal, plaintiffs seek a new trial because the court refused to allow the jury to decide issues which were not in the case. Although the claims against Thomas Jefferson University Hospital were exclusively grounded in the agency of Dr. Hirshman, which was admitted by Thomas Jefferson University Hospital, plaintiff requested the jury be permitted to find that defendant Thomas Jefferson University Hospital was independently liable. The Court refused and plaintiff claims error. By this appeal, plaintiffs further claims that, by requiring defense counsel ask proper questions instead of making speeches, the Court interfered with plaintiffs' counsel's courtroom "artistry" and his right to "do his thing". Further, plaintiffs claim error in permitting brief testimony of a prior pregnancy and contemplation of aborting the pregnancy at issue. Finally, although the verdict was delivered at 3:50 p.m. on June 8, 2000, plaintiffs claim that it was reversible for the trial Court to "refuse" to take a verdict after 3:30 p.m.

Plaintiffs, Diane Bynum and Fountain Parrish, instituted this medical malpractice action against defendants, Thomas Jefferson University Hospital, Jefferson Obstetrics and Gynecology Associates, Jefferson Associates in Radiology, Phillip Hirshman, M.D., Donald Mitchell, M.D. and Janio Szklaruk, M.D. in the Court of Common Pleas, Philadelphia in March of 1998. In December of 1998 Plaintiffs instituted a second action against Thomas Jefferson University Hospital, Thomas Jefferson Ob/Gyn Clinic and Hee-Ok Park Chia, M.D. A Petition to Consolidate these two cases was granted on September 10,

1999. All defendants, except Thomas Jefferson University Hospital and Dr. Hirshman, were dismissed by stipulation prior to the start of trial.

This case, originally tried before the Honorable Victor DiNubile, Jr., ended in a hung jury on April 14, 2000. Retrial began on June 5, before the Honorable Mark I. Bernstein. The only allegation against Thomas Jefferson University Hospital was vicarious liability for the actions of Dr. Hirshman, a resident doctor and hospital employee. Dr. Hirshman was also a named defendant. Defendant hospital agreed to take full responsibility for any negligence of Dr. Hirshman. On June 8, 2000, the jury returned a verdict that Dr. Hirshman was not negligent in his medical care. From this verdict, plaintiffs requested post trial relief.

A court has a duty to grant a new trial if it determines that the judicial process has effected a serious injustice, where there has been an error of law or where the verdict is against the clear weight of the evidence[1]. Upon review of this case, this Court must view the evidence in the light most favorable to the verdict winner.

This case arises out of a medical malpractice claim by Diane Bynum and her husband, Fountain Parrish, alleging negligence in failing to determine that plaintiffs' fetus had died in utero. No claim is made that any malpractice in any way caused the death in utero. The plaintiffs allege only damages for their own emotional distress for learning of the still birth three days later[2]. Ms. Bynum, a 28-year-old woman, had three pregnancies. Her first pregnancy resulted in a live birth, her second pregnancy was terminated by a voluntary abortion, and she suffered a still birth on her third pregnancy. Ms. Bynum's due date was December 23, 1996. On December 20, 1996, Dr. Hirshman saw Ms. Bynum for a prenatal visit. At that visit Ms. Bynum did not complain of decreased fetal movement. Dr. Hirshman

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1 *Austin v. Ridge*, 435 Pa. 1, 255 A.2d 123 (1969).

2 No claim is presented on behalf of the stillborn fetus.

testified that if he had been told of decreased fetal movement he would have immediately ordered further testing[3]. At this visit, the prenatal flow record demonstrated a positive fetal heartbeat and fetal motion. Ms. Bynum was told to return in one week to be induced if she had not yet gone into spontaneous labor.

On December 23, 1996, Ms. Bynum went to the hospital and complained that she had not felt any fetal movement that morning. She was seen by two Obstetrician/Gynecologist residents. An ultrasound was performed. No fetal motion and no fetal heart tones were detected. It was determined that the fetus was dead. The jury could properly find from the evidence that the fetus died only after the medical visit of December 20, 1996 and therefore there was no negligence whatsoever.

Plaintiffs allege that the Court improperly refused to include questions about direct liability of defendant, Thomas Jefferson University Hospital, in the jury interrogatories. There was no evidence whatsoever presented of any direct liability by Thomas Jefferson University Hospital. The only claim against the hospital was through its agent, Dr. Hirshman. Plaintiffs acknowledge that there is no evidence of any independent theory of liability concerning Thomas Jefferson University Hospital[4]. The following exchange took place at trial between the Court and counsel:

THE COURT: There's no independent theory against Thomas Jefferson; right?

MR. KEENHEEL: No, sir.

THE COURT: Then over your objection, the Jury Interrogatories will not included any reference to Thomas Jefferson. You can argue about Thomas Jefferson. I don't have any problem with that. But if counsel is agreeing, on behalf of Thomas Jefferson, that any verdict against Dr.

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3 N.T.- 6/6/00, at 424.

4 N.T.- 6/6/00, at 463.

Hirshman can be molded to include Thomas Jefferson, the jury is not going to get any question about Thomas Jefferson, except on the caption. They'll be on the caption."[5]

The decision to grant a request for jury interrogatories is discretionary and must be determined based on "whether such would add to a logical and reasonable understanding of the issue.[6]" Unnecessary jury interrogatories "can create misleading issues and defeat justice.[7]"

In *Greet v. Arned Corp.*[8], plaintiff was injured when a scaffolding collapsed. A verdict for the plaintiff ensued. The defense appealed the verdict claiming error in refusing to ask specific questions of the jury. The defendant claimed the trial court erred when it refused a request for special interrogatories on the issue of contributory negligence. The Supreme Court found that the trial judge property denied this request, because there was no evidence from which contributory negligence could be found. A judge should submit a special interrogatory only when doing so will "add to a logical and reasonable understanding of the issues[9]." Further, "(t)o permit the jury to return special findings, where they are unnecessary, can create misleading issues and defeat justice.[10]" Further, this was not in error as "(n)o evidence was presented by [defendant] showing any contributory negligence on the part of [plaintiffs] . . . "[11]

Allowing the jury to determine whether Thomas Jefferson University Hospital was independently liable, when there was no evidence of independent liability, would only invite a finding of direct liability where even plaintiffs

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5 N.T.-6/6-00, at 463.

6 *Century 21 Heritage Realty, Inc. v. Blair*, 386 Pa.Super. 373, 563 A.2d 114 (1989).

7 *Willinger v. Mercy Catholic Medical Center*, 482 Pa. 411, 445, 393 A.2d 1188, 1190 (1978).

8 *Greet v. Arned Corp.*, 412 Pa. 292, 194 A.2d 343 (1963).

9 Id. at 345.

10 Id. at 345.

11 Id. at 346.

concede there was no evidence to support such a verdict. The Court gave the jury the following instruction concerning the hospital's liability:

> You were told, at the beginning of the trial, that Thomas Jefferson University Hospital was the defendant. They take full responsibility for Dr. Hirshman's activities; and we will mold a verdict after you have reached it. Therefore, whatever verdict is reached against Dr. Hirshman is also reached against Thomas Jefferson University Hospital; and you will find no mention whatsoever on the questions concerning Thomas Jefferson University Hospital. He was their employee during the times in question, and they accept that[12].

This instruction made it clear that Thomas Jefferson University Hospital assumed all responsibility for Dr. Hirshman's liability and did not dispute that Dr. Hirshman was its agent, acting in the course and scope of his employment. An employer is responsible for the torts of his employee that occur within the scope of his employment[13]". Where such responsibility is admitted, there is no question for jury determination. To include the interrogatory requested would invite confusion or worse, an inconsistent verdict unsupported by any evidence[14]. Thus, no error was committed in refusing to grant plaintiffs' request to independently include Thomas Jefferson University Hospital in the jury interrogatories.

Plaintiffs also allege that the conduct of the trial court was prejudicial. During the course of the trial, discourtesy occasionally compelled the Court to instruct defense counsel and witnesses.

The Court did not allow a witness to interrupt counsel:

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12 N.T.- 6/8/00, at 694.

13 *Johnson v. Glenn Sand and Gravel*, 308 Pa.Super. 22, 453 A.2d 1048 (1982).

14 *Greet*, at 346.

> [Mr. Britton] Q: My question is, simply, you testified . . .
>
> [Ms. Bynum] A: Yes, I did sir.
>
> The Court: Excuse me. Excuse me. You need a full question before you can possibly answer.[15]

The Court did not allow counsel to ask multiple questions before any answer was given:

> [Mr. Britton] Q: Does your insurance card indicate "Thomas Jefferson OB/GYN clinic?"
>
> Where is your insurance card?
>
> The Court: Which question do you want answered?[16]

The Court did not allow a witness to present irrelevant testimony from a prior proceeding when the question did not call for such prejudicial material:

> [Mr. Britton] Q: to the extent that there would be testimony in this case by a Dr. Brill that he took the complete medical history from your wife, you would disagree that such a thing happened; correct?
>
> The Court: Objection overruled. That is a proper question. You can answer it.
>
> [Mr. Parrish] The Witness: Sir, according to my testimony and the testimony of Dr. Mass in prior proceedings . . .
>
> Court: You weren't asked about Dr. Mass in any prior proceedings. If there is testimony in his case that a Dr. Brill interviewed your wife while at the Hospital, would you disagree with that testimony?
>
> The Witness: Yes, sir.

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15 N.T.- 6/5/00, at 100.

16 N.T.- 6/5/00, at 178.

The Court: Next question.[17]

The Court did not allow Defense counsel to make speeches instead of asking questions:

> [Mr. Britton] Q: It's very possible, Doctor, that if a nonstress had been done, it may have been perfectly normal and reassuring.
>
> Court: That is a statement.
>
> Q: Would you agree with me, Doctor, that a nonstress may very well have been reassuring?
>
> [Dr. Polin] A: I would not agree with you at all.
>
> Q: That's your opinion because of what you've been . . .
>
> Court: Is this a question or a statement?[18]

The behavior of defense counsel culminated in a final instruction by the Court, outside the presence of the jury, that counsel would either ask questions or his examination would be terminated:

> The Court: Mr. Britton, you have tried at least two other cases in front of me. You have received my written instructions that said you must ask questions, and may not make statements posing as questions. You have been repeatedly instructed that way in this trial; and I will absolutely not permit you to lead your own witness through nonquestions. You will either ask questions of your witnesses, or the examination will be terminated.
>
> Any questions?
>
> Mr. Britton: No, sir.

The Court immediately reconsidered the harshness of the remedy for making speeches:

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17 N.T. -6/5/00, at 216.

18 N.T. -6/6/00, at 327.

> The Court: Counsel, we're back on the record. On reflection Mr. Britton, the preclusion of presenting a proper case on behalf of your client is much too severe, even for not asking questions. If you can't ask questions, I will require you to write out your entire direct examination of every witness before you begin.[19]

It is within the province of the trial judge to object to inappropriate lines of questioning, inappropriate manner of questioning or to ask a witness to clarify an answer. It is within the scope of the trial judge's duties to "confine arguments within the limitations of legitimate advocacy"[20]. It is the proper function of a trial judge to control their courtroom[21]. "A trial judge is not required to remain mute when counsel speaks of irrelevant and prejudicial matters ... counsel may properly be admonished on such occasions without nullifying the entire trial as long as the trial judge does not display partiality or prejudice by his conduct, manner of speech, or choice of language[22]." Plaintiffs' counsel never objected at trial to the Court's proper control at trial.[23] Indeed, defense counsel, recognizing the propriety of the Courts instruction, never objected. "It is the proper role and function of the trial judge to exercise his judicial powers in such a manner as to give the jury the opportunity to hear the case free from irrelevant issues and appeals to passion and prejudice . . . it is ultimately the authority and the responsibility of the trial judge to maintain the atmosphere appropriate for a fair, rational and civilized

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19 N.T. -6/6/00, at 377.

20 *Commonwealth v. Holley*, 358 Pa. 296, 301, 56 A.2d 546, 549 (1948).

21 *Behr v. Behr*, 548 Pa. 144, 695 A.2d 776 (1997).

22 *Commonwealth v. Phillips*, 183 Pa.Super. 377, 384-85, 132 A.2d 733, 737 (1957).

23 Since plaintiffs failed to raise the issue prior to verdict, any objection has been waived. *See Commonwealth v. Hammer*, 508 Pa. 88, 494 A.2d 1054 (1985).

determination of the issues, and to govern the conduct of all persons in the courtroom, including attorneys.[24]"

Plaintiffs make no allegation of prejudice or bias on the part of the Court. Neither do plaintiffs make any allegation that the discretion exercised to control the courtroom was either incorrect or inappropriate. Rather, plaintiffs only allege that plaintiff might not have objected to defense counsel's abuses. The objection is that the Court strictly maintained the trial as a serious search for the truth. There is no right to make a trial incoherent by not objecting to inappropriate evidence or inappropriate behavior by opposing counsel. No legitimate allegation of error is raised.[25]

Plaintiffs further allege that Ms. Bynum's prior abortion and consideration of aborting the pregnancy in question were irrelevant. These facts were relevant to a proper assessment of the liability claim and damages, had the jury found negligence. The only damage alleged was distress of the parents in learning of the stillbirth three days later. The only element of damages claimed was compensation for the emotional distress suffered by parent plaintiffs. Defendant's examination of Ms. Bynum concerning her abortion was limited:

> [Mr. Britton] Q: You see the date of December twenty, 1996; correct?
>
> [Ms. Bynum] A: Yes.
>
> Q: And it indicates here "ECE." Do you see, on 12/23/96?
>
> A: Yes, sir.

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24 *Commonwealth v. Brown*, 490 Pa. 560, 575, 417 A.2d 181, 189 (1980), quoting the ABA STANDARD RELATING TO THE FUNCTION OF THE TRIAL JUDGE, Comment to §1.1 (a)&(b) (1972).

25 See *Commonwealth v. Harris*, 550 Pa. 92, 104, 703 A.2d 441, 447 (1998), where cautioning counsel not to editorialize, warning counsel not to mislead the jury, and clarifying the testimony of a witness were approved.

Q: That was, in fact, your due date; correct?

A: Yes, sir.

Q: And over here it indicates "G," gravida, which is the number of times you were pregnant. Were you pregnant three times?.

A: Yes, sir.

Q: And you had delivered – this was the third time you were pregnant; correct?

A: Yes, sir.

Q: And you had delivered one child previously?

A: Yes, sir.

Q: And that child's name and age is what?

A: Chanelle. She is nine years old.

Q: She is nine years old?

A: Yes.

Q: And the second time . . .

Mr. Keenheel: Objection, Your Honor.

The Court: Basis? Legal Basis?

Mr. Keenheel: Can we have a sidebar?

The Court: Absolutely.

(Whereupon the following took place at sidebar, outside the presence of the Jury:)

The Court: Yes, sir?

Mr. Keenheel: I'm objecting to the fact that Mr. Britton is going to bring up the fact that she had an abortion.

Mr. Britton: It's very relevant.

The Court: Excuse me. Just wait. Okay. Anything further?

Mr. Keenheel: No, sir. Just irrelevant and prejudicial, and has nothing to do with what happened on December twentieth.

The Court: Mr. Britton?

Mr. Britton: It's very relevant.

The Court: What is it very relevant to?

Mr. Britton: It's very relevant, because there's evidence during this pregnancy that when she got pregnant, she was considering an abortion as well. So it's very relevant that she was suing for damages, because she had a — she's suing for damages because she had a stillborn baby; and in the past, she had an abortion, and she was considering having an abortion here. It's part of her medical history.

The Court: I don't care about her medical history. You're suing for emotional distress, as I understand it. Maybe I'm wrong. Your damages are the emotional distress of learning that her baby was stillborn in the way she learned it, rather than being told by the Doctor, or rather than going to the Hospital right then and there and being told; right?

Mr. Keenheel: Right.

The Court: That's the only element of damages; right?

Mr. Keenheel: Yes, sir.

The Court: The questions of prior abortions and abortion concerning this baby is entirely relevant for the jury to understand how to compensate her; so the objection is overruled[26].

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26 N.T. -6/5/00, at 104-107.

Plaintiff further made the accuracy of the medical record which included the prior abortion relevant to the issue of liability. Plaintiffs claimed that the defendant intentionally altered Ms. Bynum's medical records. Plaintiffs allege that the defendant tampered with her records. Ms. Bynum's abortion was contained in these records. Defense counsel was properly permitted to question Ms. Bynum to demonstrate that these records were in fact accurate. Having called into question the accuracy of the records and thereby asking the jury to find deliberate activity to conceal the truth, all parts of the medical record which plaintiffs acknowledged as accurate became relevant to prove that the medical records were in fact correct and unaltered. The Court properly admitted the evidence.

Plaintiffs further claim that the probative value of Ms. Bynum's prior abortion and her consideration of aborting this very pregnancy was outweighed by their prejudicial effect. "(Relevant) evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice . . .[27]" It is the responsibility of the trial judge to balance the probative value of the evidence against any prejudicial effect[28]. The evidence was probative both as to liability and for the proper evaluation of the claim of emotional distress damages. The issues were appropriately, briefly, and compassionately addressed at trial. Testimony about the abortion was not presented in an inflammatory or sensational manner. It was mentioned but once in a factual manner. The totality of the testimony is contained in two pages of transcript[29]. The testimony concerning Ms. Bynum's abortion was limited to the following examination:

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27 Pennsylvania Rules of Evidence, Rule 403.

28 *Morrison v. Commonwealth*, 538 Pa. 122, 646 A.2d 565 (1994); *Commonwealth v. Boyle*, 498, 447 A.2d 250 (1982); *Brinch v. Jounce*, 757 A.2d 388 (Pa.Super. 2000); *Henery v. Shadle*, 443 Pa.Super 331, 661 A.2d 142 (1996).

29 N.T. 6/5/00, at 126-127.

[Mr. Britton) Q: I think that what we were going through is that you were pregnant three times. You were pregnant–this time was one time. You had a daughter who was 9 years old. That was the second time. And the third time that you were pregnant was in 1992.

And am I not correct, that that pregnancy terminated in an abortion?

[Ms. Bynum] A: Yes sir.[30]

Q: Ms. Bynum, I was beginning to show you the records for the visit on 12/20 and there was this issue of one of the three pregnancies had been terminated in an abortion. And I think we were at that point and time we took a break.

When you came into the clinic- this is a Jefferson University Family Planning – it indicates that you first came on 4/30/96. Does that generally comport with approximately the time you came to the family Planning Clinic?

A: Yes sir.

Q: Do you-at the bottom here- well it has your address. And that was your address at the time; was it not?

A: Yes sir.

Q: You have in front of you, and you can look at it if you, like.

It indicates that you were pregnant before, and you indicated at that time two pregnancies.

Number of abortions, one. That's correct; is it not?

A: yes sir.[31]

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30 N.T.-6/5/00, at 104.

31 N.T.-6/5/00, at 125-126.

Plaintiffs were not prejudiced by the admission of Ms. Bynum's prior abortion, nor her contemplation of aborting this pregnancy. The evidence was admissible to rebut plaintiffs' claim of medical tampering with the records and to give a full picture to evaluate the only damages claimed, the parents emotional distress resulting from a "late" discovery of miscarriage[32].

Finally, plaintiffs claim that the verdict was improperly received. Prior to Jury deliberations, the Court advised the jury that due to personal obligations no verdict would be taken after 4:00 p.m., but the jury could continue deliberating as long as they chose that day. If no verdict was reached by 4:00, any verdict reached would be delivered the next day. In the presence of counsel the jury was told:

> "We will permit you to deliberate as long as you like today; but I want to tell you that I will be leaving City Hall sometime between 3:30 and 4:00, and there will be no verdict taken after I leave. My son is graduating from eighth grade. I will be there, or I won't be around the next day. But you may continue deliberating until five, or if you chose; you can leave any time after 3:30 that you say, 'Okay, let's come back tomorrow.' Now in saying this, I do not in any way want to imply that you should rush a verdict and that it would be reasonable or unreasonable for you to conclude your deliberations by 3:30 today. That is entirely up to you. And I hope I'm not rushing you. I trust that I'm not. You will do what you need to do in order to fairly render the proper verdict in this case. I am certain of that.[33]"

The length of the Jury deliberations is within the Judge's discretion and will only be reversed if there is a

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32 The Court notes that in finding no negligence the jury accepted defendant's evidence that there was a live fetus at the medical visit.

33 N.T.- 6/8/200, at 696.

finding of abuse of discretion or if the verdict was the product of coercion or an overworked fatigued jury[34]. In *Commonwealth v. Gartner*, the jury deliberated from 2:55 p.m. until 12:20 a.m., at 12:20 the trial judge encouraged the jury to continue deliberating, but gave them the option of taking a rest. The jury continued to deliberate and reached a verdict at 2:55 a.m. The Supreme Court found no coercion as "(t)he Court offered the jurors the opportunity to suspend their deliberations in order to rest for the night, but they apparently preferred to attempt a speedy resolution of the case[35]." Likewise, in this case there is no support for the allegation that the Jury suffered fatigue or was coerced, and there is no allegation that plaintiffs suffered any prejudice.

Further, plaintiffs raised no objection either when this instruction was given, or when the verdict was taken at 3:50 p.m.[36]. In order to preserve an issue for review, a party must make a timely objection[37]. No objection was raised until Post Verdict Motions were filed. Only after the verdict was rendered was any objection raised in Post Verdict Motions.

For the aforementioned reasons, the judgement of the Court should be affirmed.

BY THE COURT

/s/ MARK I. BERNSTEIN, J.
MARK I. BERNSTEIN, J.

May 16, 2001
DATE

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34 *Commonwealth v. Gartner*, 475 Pa. 512, 381 A.2d 114 (1997).

35 Id. at 531.

36 Plaintiffs claim the verdict was received at 3:30 p.m., however, the copy of the timed notes of testimony reveals that the verdict was taken at 3:50 p.m.

37 *Dilliplaine v. Lehigh Valley Trust Company*, 457 Pa. 255, 322 A.2d 114(1974).

(2)

Supreme Court, U.S.
FILED
JUN 10 2003
OFFICE OF THE CLERK

No. 02-1642

In The

Supreme Court of the United States

THOMAS JEFFERSON UNIVERSITY HOSPITAL
AND PHILIP HIRSHMAN, M.D.,

Petitioners,

v.

DIANE BYNUM AND FOUNTAIN PARRISH,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OBJECTION TO QUESTIONS PRESENTED FOR REVIEW

1. Plaintiffs object to the assertion contained in Question 1 that they put into evidence, either directly or indirectly the evidence of the prior abortion. In fact, the plaintiffs objected to said evidence which preserved the issue for appeal before the Pennsylvania Appellate Courts.

   Plaintiffs further object to the assertion contained in Question 1 that plaintiffs made " . . . serious allegations of fraud and conspiracy . . . ". Plaintiffs have never made such an allegations.

2. Plaintiffs object to the assertion contained in Question 2 that they alleged any conspiracy theory in this matter.

3. Plaintiffs object to the assertion contained in Question 3 that the December 20, 1996 record in question contained a direct reference to abortion or that the plaintiffs put the record into evidence by alleging that the defendants fraudulently altered the medical records. No such assertion was alleged.

COUNTER-STATEMENT OF FACTUAL HISTORY

Misstatements of Facts

The prevailing argument throughout the defendants' Petition for a Writ of Certiorari is the allegation that the plaintiffs asserted a "fraudulent conspiracy to alter the medical records theory" including an allegation that Dr. Hirshman returned to Thomas Jefferson University Hospital (TJUH) at some point in order to alter the records. (Defendants' Petition at page 6.) This is not only pure sophistry but an actual false statement. The testimony in question occurred during the first trial as follows:

> [Mr. Britton] Q. So are you suggesting after the lawsuit was filed which I believe was March of 1998, March of 1998, two years later, that D. Hirshman went back and falsified these records. Is that what you are suggesting?
>
> [Diane Bynum] A. I don't know when he did it. He wasn't in the room doing this in front of me. I know that I am telling the truth. I know I have the truth on my side. I don't know when he put these things on this chart. It doesn't have any of my name or nothing stamped on here. So when was it put on there?

April 11, 2000, Notes of Testimony, Bynum, et al. vs. Thomas Jefferson University Hospital, et al., Pg. 9.

Testimony on the issue in the second trial:

> [Mr. Britton] Q. So that your testimony, to the extent that the hospital records and Dr. Hirschman's record is inconsistent or proved to be inconsistent with what you say, your belief is that this was put together after this lawsuit was filed by you; correct?

> [Diane Bynum] A. I'm going to say no. My assumption of it is that – all I know is the records that you showed me in front of me has one thing. I know what happened at my visit, what the doctor said to me, and what happened. They don't coincide with the records.

June 5, 2003, Notes of Testimony, Bynum, et al. vs. Thomas Jefferson University Hospital, et al., Pg. 165.

The sole issue in the case, as pointed out by the Pennsylvania Superior Court and agreed to by the defendants on page six of its herein Petition, is whether Ms. Bynum did, in fact, advise Dr. Hirshman on December 20, 1996, that she had been experiencing decreased fetal movement. The fact that her testimony differs from the medical records does not equate to the plaintiffs asserting a fraudulent conspiracy to alter the medical records.

Finally, the defendants' assertion that the December 20, 1996 medical record "clearly documented her history of abortion" is again false. The word "abortion" does not appear anywhere on the document. Quoting from the Opinion of the Pennsylvania Superior Court as it appears on page 10a of the defendants' Petition: *"The fact that the medical history form correctly reflected the number "3" in the prior pregnancy box does not provide any relevant information to the issues in this case."*

CONCLUSION

For the foregoing reasons and in the interest of justice, Diane Bynum and Fountain Parrish respectfully request that this Court deny the instant Petition and decline to accept the appeal.

Respectfully submitted,

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